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IN THE

Supreme Court of the United States

October Term, 1968

No. 1169

NATIONAL TRAILER CONVOY, INC.,
MORGAN DRIVE AWAY, INC.,
NATIONAL TANK TRUCK CARRIERS, INC.,
and
REGULAR COMMON CARRIER CONFERENCE of
American Trucking Associations, Inc.,

v. *Appellants,*

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION
and
GRIFFIN MOBILE HOME TRANSPORTING CO.,

Appellees.

Appeal From the United States District Court for the Northern District of Oklahoma

JURISDICTIONAL STATEMENT

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Appeal From the United States District Court for the Northern District of Oklahoma

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States Distict Court for the Northern Distict of Oklahoma entered on November 21, 1968, affirming an order of the Interstate Commerce Commission, and submit this statement to show that the Supreme Court has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion, consisting of findings of fact and memorandum decision of the U. S. District Court for the Northern District of Oklahoma, from which this Appeal is taken, is reported at 293 F. Supp. 630, and is contained herein as Appendix A, pages 1a to 6a.

A prior opinion of that court remanding the case to the Interstate Commerce Commission is reported at 227 F. Supp 730, and is contained herein as Appendix B, pages 7a to 17a.

The opinion of the Interstate Commerce Commission which was remanded by the prior Distict Court decision is reported at 91 M.C.C. 801, and is contained herein as Appendix C, pages 18a to 35a. The opinion of the Interstate Commerce Commission on Reconsideration (which was affirmed by the decision presently appealed from) is reported at 103 M.C.C. 482, and is contained herein as Appendix D, pages 36a to 68a.

JURISDICTION

This suit was brought under 28 U.S.C. 1336, 1398, 2284 and 2321-2325 to set aside orders of the Interstate Commerce Commission issued in a proceeding styled Docket No. MC-124190 *Grffiin Mobile Home Transporting Co.-Common Carrier Application.* The judgment of the District Court was entered on November 21, 1968, and notice of appeal was filed in that Court on January 17, 1969. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. 1253. The following recent decisions sustain the jurisdiction of the Supreme Court to review the decision in this case; *Penn-Central Merger and N. & W. Inclusion*

Cases, 389 U.S. 486, and *United States* v. *Dixie Highway Express, Inc. et al., Braswell Motor Freight Lines, Inc. v. Dixie Highway Express, Inc.* 389 U.S. 409.

QUESTIONS PRESENTED

1. Whether, in construing the term "transportation" under Part II of the Interstate Commerce Act, the Commission and the court below are free to depart from a decision of this Court construing the identical term under Part I of the same Act.

2. Whether, by deferring to the Commission's expertise on transportation facts, the court below abdicated its duty to interpret transportation law.

3. Whether in reaching its decision the court improperly construed the history and purposes of Sections 203(a) (15) and 209(b) of the Act and encouraged vast mischief in its administration.

STATUTES INVOLVED

Sections 1(3)(a) (in pertinent part), 203(a)(15), 203(a)(19) and 209(b) of the Interstate Commeree Act, as amended, (49 U.S.C. 1(3)(a), 303(a)(15), 303(a)(19) and 309(b)) are set forth in Appendix F attached hereto, pages 85a to 87a.

STATEMENT OF THE CASE

Appellee Griffin Mobile Home Transporting Co. filed an application before the Interstate Commerce Commission pursuant to Section 203 (a)(15) and 209(b) of the Interstate Commerce Act for a permit as a contract carrier of mobile homes between points in Oklahoma, on the one hand, and, on the other, points in 33 specified states. Appellants National Trailer Convoy, Inc. (National) and Morgan Drive Away, Inc. (Mor-

gan) are motor common carriers holding authority from the Commission, *inter alia,* to transport mobile homes throughout the territory covered by the application. These appellants and others appeared in opposition at the hearing which was held before an examiner. Appellants National Tank Truck Carriers, Inc. and Regular Common Carrier Conference of American Trucking Associations, Inc., are associations of motor carriers engaged in the transportation of property in interstate and foreign commerce under authority issued by the Interstate Commerce Commission. Upon separately filed petitions to the Commission they were granted leave to intervene and thereafter participated in the proceeding.

At the hearing, applicant Griffin proposed, in addition to the transportation of mobile homes, to perform the following extra services:

(a) repair damaged trailers before towing them,

(b) connect electrical and plumbing facilities at destination,

(c) set up expando trailers.[1]

Following the hearing, the examiner recommended that the application be denied. He found applicant's proposal involved "accessorial services which go beyond what is required of carriers to meet the requirements of the public interest and the national transportation policy . . ."; that applicant's proposal "is geared to the promotion and selling of trailers" rather than transportation and that "there appears to be considerable merit in protestants' arguments that certain of

[1] Expando trailers can be expanded to larger dimensions at destination points or folded up to achieve minimum dimensions for towing on the highways.

the accessorial services to be performed by applicant exceeded those normally connected with transportation."[2]

Exceptions were filed to the recommended report. Thereafter, in a decision designated by the Commission as involving an issue of general transportation importance and reported at 91 M.C.C. 801 (attached hereto as Appendix C) the Commission, Division 1, granted the application. In reaching its conclusion, the Commission gave weight to applicant's proposal to provide the above-mentioned extra sevices. Upon review of this Commission decision, the United States District Court for the Northern District of Oklahoma rendered an opinion reported at 227 F. Supp. 730 (Appendix B herein) which set aside the Commission's order and remanded the decision to the Commission for further action in accordance with the views expressed in the decision. The court, at 227 F. Supp. 731 stated the issue to be:

> "Whether in acting upon an application for a contract carrier permit, the Commission may give consideration to non-transportation services needed by shippers and offered by applicants."

The court also found that only transportation services may be considered in a proceeding under Section 209(b) and that activities related to sale are beyond the scope of transportation (227 F. Supp. at 734).

Upon reconsideration in light of the court's opinion, the entire Commission rendered its Report on Reconsideration dated September 30, 1966, 103 M.C.C. 482 (attached hereto as Appendix D). With one com-

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[2] The recommended report of the examiner is attached hereto as Appendix E.

missioner dissenting, two commissioners dissenting in part in a separate statement, and two commissioners concurring in part in a separate statement, the Commission again concluded that the application should be granted. Two commissioners disagreed with the conclusion that the expando and utility connection services are transportation services (103 M.C.C. at 506); one concurring commissioner would hold utility connections to be a non-transportation service (103 M.C.C. 505) and the other concurring commissioner appears to believe that setting up expando trailers is sometimes a non-transportation service (103 M.C.C. 505-6). After all administrative remedies were exhausted before the Commission, the instant suit was filed. In the decision below, the District Court affirmed the Commission's finding that the extra services proposed by applicant were "transportation" services, and concluded that the Commission properly gave weight to such services under Section 203(a)(15) (49 U.S.C. 303(a)(15)) of the Act as "designed to meet the distinct needs of each individual customer." From that decision, this appeal is taken.

THE QUESTIONS ARE SUBSTANTIAL

1. This case presents an important and novel question as to whether the long-standing entry controls contained in Part II of the Interstate Commerce Act (the Motor Carrier Act) 49 U.S.C. 301 et seq. may be circumvented by an applicant's offer to perform services beyond the receiving, transporting and delivering of property. At issue here is the construction to be accorded the term "transportation" and the proper definition of services embraced within that term. It is difficult to conceive of a question more important to the administration of the Interstate Commerce Act.

Here, a contract carrier applicant was granted a permit to transport mobile homes—not because of any demonstrated need for the "transportation" of the mobile homes—but rather on the basis of its offer to perform extra services consisting of:

(a) repairing damaged trailers before towing them,

(b) connecting the electrical and plumbing facilities at destination, and

(c) setting up "expando trailers".

This case is the first in which a carrier was granted authority on the basis of an offer to perform services so remote to the receiving, transporting and delivering of goods. These extra services had not previously been required by the Commission of carriers serving the mobile home industry and consequently were not offered by petitioners Morgan and National as part of their line haul transportation service.[3] Notwithstanding the absence of a rule on the subject [4] the Commission classi-

[3] By appropriate tariff provisions, petitioners do offer to make arrangements with skilled artisans to perform these extra services when requested by the shipper. Indeed, in many states the function of connecting utilities may be performed only by licensed electricians and plumbers. cf. *Hintze Common Carrier Application,* 107 M.C.C. 348 (1968).

[4] The mischief inherent in this approach instead of proceeding by rule-making was summarized in the dissenting opinion, as follows (103 M.C.C. at 506): "It seems clear that the point has been reached where a full rulemaking proceeding should be conducted for the purpose of determining what services are transportation services and what are nontransportation services. Pending a decision in such proceeding, those services which can reasonably be considered to fall in the 'doubtful' category should not be characterized as transportation services."

fied these extra services as "transportation" because it found them ". . . incidental to the movement of the house trailers from one place to another and . . . necessary to the complete effectuation of the matter in chief." 103 M.C.C. 501. This Commission definition of "transportation service" is so vague and ambiguous as to be incapable of precise application in any given factual context and could qualify any extra service as "transportation" at the whim of the decision maker. Indeed, this was recognized by at least three of the Commissioners who participated in the decision. Commissioner Murphy, while concurring in the result, stated:

> "The fact that the majority has decided to encumber this decision by giving weight to all the various extra services lends credence to the concern that almost any proposed service will be similarly considered and that entry controls imposed by Congress in order to forestall ruinous competition among motor carriers will be diluted by the necessity to grant applications based upon novel features of infinite variety." (103 M.C.C. at 505)

And the dissent of Commissioners Bush and Tuggle states:

> "Going as far as the majority has in this case could completely destroy any line between transportation and non-transportation services. Any number of reasonably comparable "extra services" might be offered by future applicants, and I anticipate they will be so proposed. Under the precedent established by this decision, how could we say 'no'?" (103 M.C.C. at 506)

The distinction between transportation and non-transportation service was further obliterated by the

decision of the court below. Its opinion departs from the Commission's rationale but finds the Commission's result justifiable in terms of Section 203(a)(15) of the Act, 49 U.S.C. 303(a)(15), which defines a contract carrier, in part, as one who provides "transportation services designed to meet the distinct needs of each individual customer." Since the issue was whether the Commission should have considered the extra services as "transportation" the court's conclusion on this point begs the question. The court below also attempts to justify the result under section 203(a)(19) of the Act. (49 U.S.C. 303(a)(19))—a provision not mentioned in the Commission decision—which simply describes the equipment (vehicles, facilities and property) or "the performance of any service in connection therewith" covered by the provisions of Part II of the Act. The court's reading of this section at 293 F. Supp. 63 does violence to its plain language and legislative history.[5]

Moreover, the decisions of the Commission and the court below as to "transportation service" are in direct conflict with a decision of this Court. In *Baltimore & O. R. Co.* v. *United States,* 305 U.S. 507, the Supreme Court affirmed a Commission finding that in-transit warehousing voluntarily offered by rail carriers was not "transportation", and rejected a carrier contention that charges for storage-in-transit are not ware-

[5] "The definition of 'services' and transportation' is intended to cover all facilities owned and used by motor carriers. The changes made by the (Senate) Committee remove any possibility of a construction which would include the facilities of shippers or others which the motor carriers may use for pickup or delivery of shipments." Senator Wheeler, commenting on 203(a)(19), reported at 79 Cong. Rec. 5651 and 5878, April 15, 1935.

housing costs but transportation costs. This Court stated (305 U.S. 507, 525-26):

> "The Commission found that the in-transit warehousing was not a part of transportation. This finding is not affected by the determination of the Commission that the rates and charges should be published in the tariffs. Indeed, in its report on the subject the Commission said 'What is here condemned is the fact that the respondents have voluntarily engaged in storage and warehousing services which are not within their common-carrier obligations and, by providing such services to shippers below the cost of such services, reduce the cost to such shippers for the transportation of their goods. The tariffs now on file are instruments which work violations of the act in that, through them, respondents hold themselves out to perform commercial services (under the guise of performing transportation services) at rates and charges which fail to compensate respondents for the cost of performing them, and thereby violate sections 2, 3, and 6 of the act.'
>
> "We accept this conclusion. If the service is non-transportation, the fact that it is in a tariff does not save it from the condemnation of Section 6(7)."

The Commission decision which was affirmed in *Baltimore & O. R. Co.* v. *United States,* 305 U.S. 507 announced the following standard for distinguishing "transportation" from extra services offered by carriers:

> "*There are many services and acts,* including storage and handling of goods, *which are necessary in or incidental to the convenience of goods by* rail from one locality to another, *which are not a part of transportation as defined in section 1.* A clear distinction should be made between voluntary or

> commercial storage ordinarily performed by a warehouse and the involuntary storage which carriers subject to the act are *obligated to perform*. Our duty, under the circumstances here involved, requires us to determine when transportation as defined in the act begins and ends, and to determine whether acts or services incident to the conveyances of goods from one point to another are or are not a part of transportation which common carriers subject to the Interstate Commerce Act are obligated to perform." (Emphasis added) *Propriety of Operating Practices—New York Warehousing*, 198 I.C.C. 134, 216 I.C.C. 291, 270 I.C.C. 102 (at 216 I.C.C. 348).

Thus, the key to determining whether a particular service is embraced within the term "transportation" as used in the Act is whether the service constitutes a necessary step in the performance of the line-haul transportation which the carrier is obligated to perform. The standards here adopted by the Commission and the court below for determining what is "transportation" under the Act are in direct conflict with the *New York Warehousing* case. Had the *New York Warehousing* standard been applied here—as it should have been—the extra services proposed by applicant would have been ignored as "not a part of transportation." If *in-transit warehousing* is "not a part of transportation" how can *pre-transit repairs* and *post-transit utility connections* be considered a part of "transportation?" Mobile home carriers are not "obligated to perform" these services.

The proposition that not every service rendered in conjunction with transportation qualifies as a "transportation service" has long been settled. The *New York Warehousing* "obligated-to-perform" test

was applied in *Walling* v. *Baltimore Steam Packet Co.*, 144 F.2d 130, 134 (1944) where the court said:

> "The phrase 'services in connection with' is used in sections 1 (3), 6 (7) and 15 (13) of the Interstate Commerce Act, 49 U.S.C.A. §§ 1 (3), 6(7), 15(13); and as so used, it has uniformly been construed to mean service rendered while a shipment is in the custody and control of the carrier or service which the carrier is legally obligated to perform. Thus service is not rendered 'in connection with transportation' in the case of the spotting of cars on an industrial siding (United States v. Wabash R. Co., 321 U.S. 403, 64 S.Ct. 752; United States v. American Sheet & Tin Plate Co., 301 U.S. 402, 57 S.Ct. 804, 81 L. Ed. 1186); nor in maintaining offices, advertising the railroad or soliciting traffic over it (Lehigh Valley R. Co. v. United States, 243 U.S. 444, 37 S.Ct. 434, 61 L.Ed. 839); nor in towing car floats to point of shipment, Pennsylvania R. Co. v. M. McGirr's Sons Co., 2 Cir., 287 F. 334."

The Commission itself has recognized and adhered to the holding of the *Walling* case. See *Eastern Central M. Carriers Assn.* v. *Baltimore & O. R. Co.* 314 I.C.C. 5, 47 (1961), and that decision was sustained in *Cooper-Jarrett, Inc.* v. *United States,* 226 F. Supp. 318, 322 (1964), aff'd. 379 U.S. 6, wherein the lower court specifically followed the *Walling* case.

What is surprising is that the Commission's decision here recognizes its *New York Warehousing* precedent as "the controlling decision as to the meaning of the word 'transportation' under part I of the Act," (103 M.C.C. 486) and states (at 103 M.C.C. at 487):

> ". . . the fundamental principles there approved have received judicial sanction, are well known in transportation circles, and may readily be ap-

plied as an aid in resolving difficult questions in this area whether they arise under part I or part part II of the act."

Having said this, the Commission then totally ignores the teaching of *New York Warehousing* in the next 20 pages of its opinion. Nothing in Part II of the Act supports the diametrically opposite result reached here. On the contrary, since the term "transportation" under Part I is defined more broadly than under Part II,[6] a service which does not qualify as "transportation" under the Part I standard, would, *a fortiori,* not pass muster under Part II. If the decisions below are allowed to stand, a conflict with settled law will result, the Commission's jurisdiction will be enlarged without Congressional sanction (by allowing consideration of service gimmicks not properly a part of "transportation") and the door will be open to similar applications in which extra service gimmicks will be substituted for proof of need for "transportation" service.[7]

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[6] Section 1(3)(a) of the Act, 49 U.S.C. 1(3)(a) defines "transportation" as follows:

> "The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities of shipment or carriage, irrespective of ownership or of any contract, express, or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported".

Section 203(a)(19), 49 U.S.C. 303(a)(19) describes the "services" and "transportation" to which Part II applies with reference to vehicles and facilities operated by the carrier. See "Appendix F hereto.

[7] It is interesting to note that nothing in the permit granted by the Commission *requires* applicant Griffin to perform the extra services promised as a means of securing the permit. Griffin with impunity can refuse to perform these services.

2. The decision below accords to the expertise of the Commission more than is accorded by law. Appellants recognize that the expertise of the Commission in making determinations of fact is wide and, if based upon substantial evidence, is not the subject of much more than cursory judicial review. The court below, however, did not stop with the application of this principle but proceeded to enunciate a new principle, hitherto unknown, the effect of which is the abdication by the court of its authority to interpret matters of law as distinguished from matters of fact.

What was before the court below was a question of the interpretation of a statute. While the Interstate Commerce Commission is, as that court recognized, "charged with responsibility for the administration of the Act," (293 F. Supp. at 634) the court errs when it accords to the Commission greater expertise than is possessed by the court in the legal interpretation of "critical language in a statutory scheme." (293 F. Supp. at 633)

In its first decision the court had articulated one criterion by which it proposed that the Commission be governed and that was the determination that the Commission could lawfully consider only "transportation" requirements as distinguished from "sale" or other requirements. But it noted that the final review of what the statute means by "transportation" is for the judiciary.

Since the statute directed the Commission to base its decision on "transportation" requirements, the determination here was in effect a delineation of the stautory limits of the Commission's power to act. This is a judicial function.

The failure of the court below to recognize and discharge this function is in conflict with principles of administrative law approved by this Court in *Social Security Board v. Nierotke,* 327 U.S. 358, in which the Court said (327 U.S. at 369):

> "Administrative determinations must have a basis in law and must be within the granted authority. . . . An agency may not finally decide the limits of its statutory power. That is a judicial function . . . ."

The Court then concluded:

> ". . . the Board's interpretation of this statute to exclude back pay goes beyond the boundaries of administrative routine and the statutory limits."

Simply stated, while deference is due the Commission in the exercise of its fact finding process, there is no basis for undue deference where statutory construction is the consideration before the reviewing court. It is in the courts, not in the Commission, that the ultimate expertise in matters of law must reside. Since the court below surrendered its prerogative to the Commission, it should be retrieved by the Supreme Court.

3. The decision of the court below gives no evidence of consideration of the Congressional objectives underlying Sections 203 (a) (15) and 209(b) of the Act. (49 U.S.C.A. 303(a)(15) and 309(b)) Yet these objectives are of paramount importance in this case. For if the action of the Interstate Commerce Commssion was inconsistent therewith, its decision is clearly unlawful and arbitrary and constitutes an abuse of discretion, and approval thereof by the court below is manifestly in error.

That the objective of Congress in passing the 1957 amendments to the Interstate Commerce Act was to

protect common carriers is clear. The Senate Report embodying the views of the Committee which held hearings on the bill that, as amended, became law, concludes with this paragraph:

> "Your committee is of the opinion that the public interest in a sound transportation system, and particularly in a stable and adequate system of common carriage, in the light of the objectives of the national transportation policy require that the bill, as amended, be passed." [8]

The court below in actual fact merely accepted what the Commission did, and itself failed both to interpret the law and to evaluate the Commission's interpretation thereof. The critical paragraph of the opinion below in this connection appears in these words:

> "As we have seen, one of the prime purposes of the contract carrier provisions of the Interstate Commerce Act, as gleaned from Section 203(a)(15), is to provide 'transportation services designed to meet the distinct need of each individual customer.' The statute does not require that these services be necessary but rather that they be designed to meet individualized transportation needs. The terms 'services and transportation' are defined 'to include all vehicles . . . together with all facilities and property . . . used in the transportation of passengers or property . . . or *in the performance of any service in connection therewith.*' [emphasis added] 203 (a)(19). The services offered by Griffin meet all of these tests in that as a whole, they were designed with the specific transportation needs of the supporting shippers and dealers in mind and thus qualify under the Act as 'transportation services.'" (293 F. Supp. at 634)

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[8] Senate Report No. 703, July 24, 1957, U.S. Cong. News '57, p. 1605.

The quoted paragraph from the court's opinion contains two obvious errors. The first is that "one of the prime purposes of the contract carrier provisions of the Interstate Commerce Act . . . is to *provide* 'transportation service designed to meet the distinct need of each individual customer.'." This interpretation overlooks the fact that Section 203(a)(15) is merely a definitional provision and serves to define or determine whether the transportation service in question is contract carrier in nature. There was no effort on the part of Congress, and nothing in the legislative history, to indicate that a "prime" purpose of the amendments is to "provide transportation." Transportation was not shown to be in short supply. It is eminently clear, however, that Congress did undertake to identify, describe and limit the nature of the transportation that contract carriers may perform. And that transportation, the statute says, to be contract in nature, must, as relevant here, be designed or tailored to meet the "distinct need" of the customer. But, first, the service must be "transportation."

The second obvious error in the quoted paragraph is that the court has accepted without question the Commission's interpretation of the term "transportation services" and has thus embraced within that term, as shown earlier herein, services which have no relation to transportation as that term has been interpreted by the Commission, and by this Court.

Overlooked by both the Commission and the court below is the position of the Commission in *New York Warehousing, supra,* affirmed by this Court in *Baltimore & O. Ry. Co. v. United States, supra,* wherein the Commission said that there are many services and acts which are necessary in or incidental to the conveyance of goods which are not a part of transportation.

Thus the Commission, though acknowledging the principle established by it in *New York Warehousing,* and upheld by the Supreme Court, and recognizing its value (103 M.C.C. at 487) completely abandoned that principle. The court below, without testing the Commission's interpretation of the statute, merely accepted what the Commission did.

It becomes important to note that the Commission interpreted the word "transportation" to mean the same for common carriers as for contract. In its decision in this case, noting the legislative history of the evolution of "transportation" it said, at 103 M.C.C. 485:

> "This definition applies equally to common and contract carriers by motor vehicle and it may not be applied differently to either class of carriage. *what is 'transportation,' therefore, must mean the same for both common and contract carriers alike.*" (Emphasis added)

It makes no difference, then, in interpreting the term "transportation" that the services proffered by applicant Griffin may have differed from the services offered by some common carriers. The question is whether those services may lawfully be considered to fall within the term "transportation," for the determination whether a permit (or certificate) is to be granted is a determination made upon the "transportation" services which an applicant proposes to render. And if an applicant is to be granted operating authority on the basis of service which is not a transportation service there can be no certainty or guideline by which opposing carriers, whether contract or common, may know the "rules of the game" or the ambit or direction, of regulatory policy. The question

is not so much whether the particular applicant should be granted the rights in question upon a proper showing by it, but whether the tests by which his application is measured are known, understood, consistent and lawful. The subject was helpfully discussed by Judge Friendly in "The Federal Administrative Agencies—The Need for Better Definition of Standards" (1967) in these words:

> "A prime source of justified dissatisfaction with the type of federal administrative action which I will shortly specify is the failure to develop standards sufficiently definite to permit decisions to be fairly predictable and the reasons for them to be understood; this failure can and must be remedied." (pp. 4-5; footnote omitted.)
>
> "A second reason for definite standards of administrative adjudication is the social value in encouraging the security of transactions. An airline considering an investment of $100,000,000, in additional jet transports, which it thinks necessary to give adequate service on its routes over a decade, ought to have some notion whether it will be allowed to serve the existing and anticipated traffic, along with other airlines then certificated, or whether its very success in traffic development will become the basis for additional authorizations. So ought the lenders who will be providing most of the money. A trucker contemplating the purchase of a new fleet should know the degree to which he will or will not be protected from rate-cutting by other truckers or by competing modes of transportation. Although no such assurances are afforded in unregulated sections of the economy, a greater degree of predictability is a proper offset for some of the hampering effects of regulation." (p. 20, footnote omitted.)

The court below properly places particular emphasis upon that portion of the 1957 amendments which

refers to the "distinct need" of the shipper but improperly treats it as a transportation need, regardless of whether it is such a need in light of the statute and of interpretations relied upon by the Commission and confirmed by the Supreme Court. The only "distinct need" which can qualify as a criterion or standard undergirding a grant of contract carrier authority is a "transportation" need.[9] This basic principle the Commission sidestepped, and the court below merely adopted what the Commission had done, thus abandoning its own role of interpreter of the law.

Unique in the situation and aggravating the problem confronting appellants here is a decision by the court below, *National Trailer Convoy, Inc. v. United States,* 293 F. Supp. 634 (1968), (reached on the very day of the decision here challenged) in which the Commission had granted to a common carrier applicant a certificate to transport mobile homes—the commodity involved in the instant contract carrier case. There a common carrier applicant, Martin Trailer Toters, Inc., had offered to render ordinary transportation, and, as "extras," to provide the inflation of mobile home tires by an air compressor, and the use of a winch to move such home trailers in and out of mud and soft ground. But the court below struck down the grant, remanding the case to the Commission. The only distinction offered by the court lies in the definitional differences

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[9] This principle was recognized by the initial decision of the court below which remanded the case to the Commission. The opinion by Judge Breitenstein states:

> "The language is plain and unambiguous. The contracts are to furnish transportation services. Such services, and only such services, are to meet the distinct needs of the customers. The reference to transportation services restricts and limits the language which follows." (227 F. Supp. 732)

between common and contract carriers. In effect, the court held that "transportation" is to be given different meanings, depending upon who performs it. By so doing the court reached a conclusion diametrically opposed to that of the Commission as expressed in the language quoted above. (103 M.C.C. at 485)

While overlooking its Constitutional role as statutory interpreter the court below also overlooked the real basis for the 1957 amendments which, as shown earlier by quotation from the Senate Committee Report, is basically to preserve the public interest in a stable and adequate system of common carriage in the light of the objectives of the Act and of the National Transportation Policy. That these objectives of the Act and of the Policy will be vitiated can readily be demonstrated. It takes no magic, but merely the exercise of imagination for a contract carrier applicant to propose any number or variety or range of extra services which are not normally rendered in order to constitute something different from what is presently available. The policy established by the Commission, and upheld by the court below, would invite precisely this sort of imaginative approach. With such an approach a contract carrier grant is virtually assured. The vast mischief perpetrated by the action here complained of was realistically seen by dissenting Commissioners Bush and Tuggle when, in their dissent they observed that future applicants offering novel nontransportation services could not be answered "no." (103 M.C.C. at 506)

CONCLUSION

The questions presented by this appeal have heretofore been designated by the Commission as involving an issue of general transportation importance. Such a designation is used sparingly by the Commission and applies only to precedent cases. Moreover, it was done here on the Commission's own motion. Appellants urge that in this particular the Commission was correct in recognizing that the case involves matters of importance far beyond the ordinary.

Further, the Commission appears to have announced a broad rule "affecting applications for motor carrier operating authority generally." (103 M.C.C. at 483)

THEREFORE, it is respectfully requested that for the reasons discussed in this Jurisdictional Statement this

Court note jurisdiction to the end that this appeal be docketed for plenary review, with briefs and argument.

Respectfully submitted,

NATIONAL TRAILER CONVOY, INC.
MORGAN DRIVE AWAY, INC.
NATIONAL TANK TRUCK CARRIERS, INC.
REGULAR COMMON CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC.

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